**STATE OF RHODE ISLAND**

**PROVIDENCE, SC.** **SUPERIOR COURT**

**[FILED: August 30, 2023]**

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| **MICHAEL ANTHONY** | : | |
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| **VS.** | : | **C.A. No. PC-2018-5376** |
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| **JOSEPH CHIODO, in his capacity as TREASURER and FINANCE DIRECTOR for THE TOWN OF JOHNSTON** | : | |

**DECISION**

**LANPHEAR, J.** This matter came on for trial before Mr. Justice Lanphear, jury waived, on May 24, 2023.

**I**

**FINDINGS OF FACTS**

In February 2009, Mr. Anthony, the plaintiff herein, was arrested by the Johnston police for having a firearm in his vehicle. In June 2009, he pled nolo in Superior Court to carrying a pistol without a license, in violation of G.L. 1956 § 11-47-8(a) and received a deferred sentence. After his sentence was completed, he moved to have his conviction expunged.[1] Shortly after the Court expunged his sentence, Mr. Anthony's attorney sent a copy of the order to the Johnston police. Although the police received the order in August 2017, it failed to enter the information

[1] Oddly, the statute allows criminal defendants to *falsely* state on job applications that they have never been convicted even when, in fact, they have been. G.L. 1956 12-1.3-4(b). Clearly the conviction is nullified by the expungement statute, but this statute goes much further, allowing outright misrepresentations. Such a statute must be read strictly, given its derogation of the common law. *Tarzia v. State*, 44 A.3d 1245, 1257 (R.I. 2012).

into its computer. Instead of the record being expunged, it stayed as an active record of conviction in the Johnston police computer records.

In October 2017, Mr. Anthony applied to the Cranston Police Department for a permit to carry a concealed gun. In the application Mr. Anthony stated that he had not been convicted of a crime and had not been arrested. When the Cranston police investigated, they discovered a report on Mr. Anthony and obtained a copy of Mr. Anthony's arrest report from the Johnston police. The Cranston Police denied Mr. Anthony's permit application. The denial letter stated in part:

> "On your application, you indicated you have never arrested. (sic) A statewide inquiry with law enforcement departments in Rhode Island revealed you were arrested by the Johnston Police Department on February 9, 2009 for Loaded Weapons in Vehicles. Your failure to disclose this information, as well as the manner you improperly and unlawfully transported a loaded firearm according to the police report, led to my decision to reject your application." Joint Exhibit 10.

Mr. Anthony then contested the denial of the permit to the Rhode Island Supreme Court. The application for a writ of certiorari was denied, (*Anthony v Winquist*, No. 2018-253-M.P.) but Mr. Anthony had paid $3200 in legal fees. He previously incurred $650 in legal fees to obtain the expungement order. Mr. Anthony applied for another permit through the East Greenwich police. He testified here, and this Court finds, that he did not pursue his Rhode Island permit as he applied for and received a concealed weapon permit in Florida, where he then resided.

**A**

**Presentation of Witnesses**

Mr. Anthony was credible, cooperative, consistent, frank and responsive. He recited the difficulties he had in having the prior criminal case expunged. He modified his testimony to correct himself concerning the date he received permission from Florida. He was concerned about being inaccurate and appeared very credible. Oddly, Mr. Anthony testified that he first received

his concealed weapon permit from Florida in 2017. During his testimony he changed this to 2020. This harmed his credibility, but the Court found him to be credible.

The parties did not dispute the facts. There was considerable agreement on the facts and counsel submitted a joint statement of facts.

## II

## ANALYSIS

Mr. Anthony is not before the Court now to request an expungement or to secure his permit. He is before the Court seeking damages for the alleged wrongful conduct of the Johnston police, in failing to properly remove the arrest records. His complaint sounds in three specific counts and it is these three counts which were pursued at trial:

1. Intentional infliction of emotional distress.
2. Contempt.
3. Invasion of privacy for unreasonable publicity.

### A

### Intentional Infliction of Emotional Distress

> The Joint Statement of Facts says in part:
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> "The Bureau of Criminal Identification in the Johnston Police Department *mistakenly* did not enter the required information in its computer system to properly expunge Plaintiff's record of conviction." (Joint Exhibit 13, ¶ 8, emphasis added.)

If it was a mistake, it was not intentional. There was no evidence presented that the actions of Johnston were intentional. At trial, no town witnesses testified, although the town acknowledged that it was the town's mistake for not removing the records. It also admitted that the police received notice of the court expungement action.

As the failure was the result of a mere mistake, without something more Mr. Anthony cannot establish the failure as extreme or outrageous. It was a mistake, openly admitted, which

shouldn't have happened, caused little harm, was not shown to place the plaintiff in danger or to harm his work or home life. Therefore, it is not the type of conduct which is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Swerdlick v. Koch*, 721 A.2d 849, 863 (R.I. 1998).

The conduct of Johnston was not sufficiently outrageous.

To establish intentional infliction of emotional distress, Mr. Anthony must also establish physical symptoms. Mr. Anthony testified that he is fearful of the police when he is travelling through Johnston as he fears the police may consider him "undesirable." He indicated that he "feels queasy" going through Johnston but was not very descriptive. On cross-examination, Mr. Anthony acknowledged that the harm was not physical, just somewhat humiliating.

Finally, for "the tort of intentional infliction of emotional distress . . . we require for recovery . . . that psychic as well as physical injury claims must be supported by competent expert medical opinion regarding origin, existence and causation." *Vallinoto v DiSandro*, 688 A.2d 830, 839 (R.I. 1997). No medical evidence was introduced, other than the testimony of Mr. Anthony.

Having failed to meet these prerequisite qualifications by a preponderance of the evidence, Mr. Anthony has failed to prove the count of intentional infliction of emotional distress.

**B**

**Contempt**

Mr. Anthony did not suggest, nor provide legal precedent for a private right of action in contempt.

In *State v. Lead Industries Association, Inc.*, 951 A.2d 428, 464 (R.I. 2008) (hereinafter "the Lead Paint case") our high court addressed several findings of contempt by a trial court judge in a contentious case. In considering contempt, the court stated:

> "A finding of contempt is within the sound discretion of the trial justice. Factual findings at a contempt hearing will not be disturbed unless they are clearly wrong or the trial justice abused his or her discretion. A complaining party can establish civil contempt on behalf of his opponent when there is clear and convincing evidence that a lawful decree has been violated." (Citations and quotations omitted.)

As the trial court was empowered to find contempt after an appropriate hearing, this court need not address, at this juncture, whether or not a private cause of action is allowed. *See* Def.'s Post-Trial Mem. 12, June 27, 2023. The trial was an opportunity for evidence to be presented, witnesses confronted, and an opportunity to be heard. Instead, this Court will consider the parameters for which a contempt may be found.

The Lead Paint case also held

> "To establish civil contempt, there must be a showing by clear and convincing evidence that a specific order of the court has been violated. A finding of civil contempt must be based on a party's lack of substantial compliance with a court order, which is demonstrated by the failure of a party to employ the utmost diligence in discharging [its] . . . responsibilities. Determining whether there has been substantial compliance with an order of the court, so as to avoid a finding of civil contempt, depend[s] on the circumstances of each case, including the nature of the interest at stake and the degree to which noncompliance affects that interest." 951 A.2d at 466.
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> . . .
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> "To be the basis of a contempt finding, the court's November order also must be sufficiently clear. . . . [F]or a restraining order to be enforceable by contempt proceedings, it should be clear and certain and its terms should be sufficient to enable one reading the writ or order to learn therefrom what he may or may not do thereunder." *Id.* at 465.
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> . . .

> "Because of the severe consequences of a civil-contempt finding, courts have read court decrees to mean rather precisely what they say. Any ambiguities or uncertainties in court orders are read in the light most favorable to the person charged with contempt." *Id.* at 467 (citations and quotations omitted).

Here, there is no order or decision in this action seeking to be enforced. Rather, it is an order of expungement in a prior action. The order declared "All records and records of conviction relating to the conviction of the above-reference case shall be **expunged** and all index and other reference to it removed from public inspection pursuant to G.L. 1956 § 12-1.3-3(c)." *See* Exhibit 4 (emphasis in original).

While the Johnston police openly acknowledges that the records were not destroyed, the only records which the Johnston police forwarded to the Cranston police are those in in Joint Exhibit 9. A careful review of those records reveals that they do not reference any conviction.[2] They contain only the police reports, the arrest, and an arraignment. None of these, of course, are a conviction, or related to the conviction. This Court acknowledges that the expungement law contains a very broad definition of records, but the order is not as specific.[3]

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[2] Ex. 1.

[3] The statute itself defines an expungement. "'Expungement of records and records of conviction' means the sealing and retention of all records of a conviction and/or probation and the removal from active files of all records and information relating to conviction and/or probation." Section 12-1.3-1(2).

This appears to require sealing and retention of conviction and post-conviction records only. It does not expressly require that all arrest records but the definition of "records" in § 12-1.3-1 includes records "in the possession of any state or local police department, the bureau of criminal identification and the probation department, including, but not limited to, any fingerprints, photographs, physical measurements, or other records of identification. . . ."

The Court does not find clear and convincing evidence that an order of the court—a clear order—was violated. Moreover, both parties agree that any information retained by the Johnston police was held by mistake, not intentionally. Accordingly, the Court would not and does not exercise any discretion it may possess to find contempt. More importantly, this Court does not find clear and convincing evidence of a violation. The language of the Lead Paint case directs the Court to consider "the utmost diligence" of the defendant "in discharging … responsibilities." The Johnston police not only have an obligation to comply with the expungement order, but also to share available information in criminal files with other law enforcement agencies. Mr. Anthony never established that the town, in releasing the information, knew the file to be expunged.

Accordingly, Mr. Anthony's request for a finding of contempt fails.

**C**

**Right to Privacy**

Plaintiff's second count alleges an invasion of privacy. In his original complaint, Mr. Anthony sought recovery under G.L. 1956 § 9-1-28.1(a) (3) and (4). Subsection 3 relates to unreasonable publicity in one's life, while subsection 4 relates to placing one in a false light. The claim under violation of privacy in a false light (subsection (4)) was dismissed on a motion for summary judgment in this action (Order, Nov. 18, 2019). Therefore, only the claim under subsection (3) remained for trial.

The statute reads, in pertinent part:

> **"9-1-28.1. Right to privacy—Action for deprivation of right.**
> **"(a) Right to privacy created.** It is the policy of this state that every person in this state shall have a right to privacy which shall be defined to include any of the following rights individually:
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> . . .
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> **"(3)** The right to be secure from unreasonable publicity given to one's private life;

> **"(i)** In order to recover for violation of this right, it must be established that:
> **"(A)** There has been some publication of a private fact;
> **"(B)** The fact which has been made public must be one which would be offensive or objectionable to a reasonable man of ordinary sensibilities;
> **"(ii)** The fact which has been disclosed need not be of any benefit to the discloser of the fact.
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> . . .
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> **"(b) Right of action.** Every person who subjects or causes to be subjected any citizen of this state or other person within the jurisdiction thereof to a deprivation and/or violation of his or her right to privacy shall be liable to the party injured in an action at law, suit in equity, or any other appropriate proceedings for redress in either the superior court or district court of this state. The court having jurisdiction of an action brought pursuant to this section may award reasonable attorneys' fees and court costs to the prevailing party.
> **"(c) Right of access.** Nothing in this section shall be construed to limit or abridge any existing right of access at law or in equity of any party to the records kept by any agency of state or municipal government." Section 9-1-28.1.

While an arrest report may be embarrassing or contain unproven facts, it does not, in and of itself, contain private facts. Here, it reports that Mr. Anthony was driving on a public street, stopped by a police officer for allegedly going through stop signs without stopping. Mr. Anthony stopped on a public street and later revealed the presence of a loaded firearm in the trunk. He opened the trunk on the public street. From 2009 until 2017 (the expungement date), this was an open, available police report which paired to an open, available court file. These are public files. There can be no expectation of privacy in a document in an open police file. *See Hatch v. Middletown*, 311 F.3d 83, 86 (1st Cir. 2002). Indeed, G.L. 1956 § 38-2-2(4)(D) deems police records to be public, particularly after the investigation is complete. Mr. Anthony has also failed to set forth the publication of any false or fictitious fact by any defendant.

Mr. Anthony has not proved that the town was disclosing a private fact or a private report and hence the count for violation of privacy fails.

**Lack of Respondeat Superior Liability**

The defense alleges that respondeat superior liability may not apply, as no specific police official is named as the responsible party.

Allegations that non-party members of the state police may have violated either Fourth Amendment or privacy rights of plaintiff do not give rise to *respondeat superior* liability on the part of supervisors. *See Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 691 (1978) (municipality cannot be held liable on a *respondeat superior* theory). An employer, whether a municipality or an officer of the government, is only responsible for the acts of a subordinate if the action that is alleged to be unlawful implements or executes a policy promulgated by the superior or the governing body of the entity against whom the complaint is made. *Id.* at 690; *Ensey v. Culhane*, 727 A.2d 687, 690 (R.I. 1999).

In *Monell*, the U.S. Supreme Court held that the municipality is liable only in civil rights actions when the constitutional infringement was the result of an official policy. *Monell*, 436 at 691. In the case at bar, it was agreed that the municipality *mistakenly* failed to remove the conviction from their records, the policy appears to have been quite the opposite. An error, rather than an improper policy, is not actionable.

**III**

**CONCLUSION**

For the reasons stated, judgment is awarded to the defendant, against the plaintiff on all counts.

**RHODE ISLAND SUPERIOR COURT**

***Decision Addendum Sheet***

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| **TITLE OF CASE:** | **Michael Anthony v. Joseph Chiodo, in his capacity as Treasurer and Finance Director for the Town of Johnston** |
| **CASE NO:** | **PC-2018-5376** |
| **COURT:** | **Providence County Superior Court** |
| **DATE DECISION FILED:** | **August 30, 2023** |
| **JUSTICE/MAGISTRATE:** | **Lanphear, J.** |
| **ATTORNEYS:** | |
| **For Plaintiff:** | **Sean M. McAteer, Esq.** |
| **For Defendant:** | **Marc DeSisto, Esq.; Ryan D. Stys, Esq.** |